Nos. 11,781, 11,782, 11,783, 11,784

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HEARST PUBLICATIONS, INCORPORATED, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee,

THE CHRONICLE PUBLISHING COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR APPELLEE.

THERON LAMAR CAUDLE,
Assistant Attorney General,

SEWALL KEY,
A. F. PRESCOTT,
ARTHUR L. JACOBS,
Special Assistants to the Attorney General.

FRANK J. HENNESSY,
United States Attorney,

WILLIAM E. LICKING,
Assistant United States Attorney.

Subject Index

Table of Authorities Cited

Cases

Statutes

Miscellaneous

Nos. 11,781, 11,782, 11,783 and 11,784

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HEARST PUBLICATIONS, INCORPORATED, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee,

THE CHRONICLE PUBLISHING COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR APPELLEE.

OPINION BELOW.

The opinion of the Court below is reported in 70 F. Supp. 666. (R. 24-47.)[1]

[1]All record references will be to the record in No. 11,781 unless otherwise indicated.

JURISDICTION.

These appeals involve the taxes imposed by Titles VIII and IX of the Social Security Act, the Federal Insurance Contributions Act and the Federal Unemployment Tax Act for the years 1937 through 1940 in the aggregate amount of $13,447.55.

The taxes in dispute were paid as follows: In No. 11781, $1,614.49 on February 16, 1942, $2,531.47 on January 22, 1943, and $2,187.76 on February 12, 1945; in No. 11782, $1,207.32 on June 28, 1941, $408.58 on February 6, 1943, $409.07 on May 14, 1943; $408.69 on August 9, 1943, $408.91 on November 13, 1943, $409 on February 18, 1944, $408.96 on May 13, 1944, $408.96 on August 14, 1944, and $881.42 on February 3, 1945; in No. 11783, $421.60 on February 19, 1945, and $668.06 on February 3, 1945; in No. 11784, $285.39 on June 27, 1941, $96.57 on February 5, 1943, $96.69 on May 14, 1943, $96.60 on August 9, 1943, $96.65 on November 13, 1943, $96.70 on February 18, 1944, $96.66 on May 13, 1944, $96.66 on August 14, 1944, and $111.34 on February 3, 1945. A claim for refund was filed for each payment on the date of payment. The claim for refund of the first payment in dispute in each suit was rejected by notice dated July 13, 1945.

On October 11, 1945, within the time provided by Section 3772 of the Internal Revenue Code, the taxpayers brought four suits in the District Court for the recovery of the taxes and interest paid. (No. 11781, R. 3-4, 9-10, 11, 15-16; No. 11782, R. 4-5, 10-11, 12-13, 14-15, 16-17, 18-19, 20-21, 22-23, 25, 29-31; No.

11783, R. 4, 9, 13, 14; No. 11784, R. 3-4, 9-10, 11, 13, 15, 16-17, 18, 19-20, 21-22, 26-27.)

The jurisdiction was conferred on the District Court by Section 24, Twentieth, of the Judicial Code. The judgment in each suit was entered on April 29, 1947. (No. 11781, R. 72; No. 11782, R. 32-33; No. 11783, R. 16; No. 11784, R. 28-29.) Within three months thereafter and on July 21, 1947, notice of appeal was filed pursuant to the provisions of Section 128(a) of the Judicial Code, as amended. (No. 11781, R. 77; No. 11782, R. 37; No. 11783, R. 20-21; No. 11784, R. 33.)

QUESTION PRESENTED.

Whether the adult street news vendors engaged in the sale of the taxpayers' newspapers are their "employees" within the Social Security Act.

STATUTES AND REGULATIONS INVOLVED.

These are set forth in the Appendix, infra.

STATEMENT.

The essential facts, taken from the findings of the court below, are these:

One of the taxpayers (hereinafter called the publishers), The Chronicle Publishing Company, a California corporation, is the owner and publisher of the

San Francisco Chronicle (hereinafter called the Chronicle), a daily, morning and Sunday newspaper sold in San Francisco, California, and vicinity. The other taxpayer, Hearst Publications, Incorporated, a California corporation, is the owner and publisher of two daily newspapers, the San Francisco Examiner (hereinafter called the Examiner), a daily, morning and Sunday paper, and the San Francisco Call-Bulletin, a daily, evening newspaper sold in San Francisco, California, and vicinity. (R. 63-64.)

During 1938, 1939 and 1940, the Examiner was published and sold in four editions daily, and the Chronicle in five editions daily. A substantial portion of the publishers' circulation is effected through street sales by news vendors. (R. 64.)

For sales by street news vendors, the publishers divide the city into a number of districts. With respect to the Examiner, the city was divided during 1937 to 1940 in districts ranging from ten to twenty. In the case of the Chronicle, the city was divided in eleven districts. Each of the districts contained a number of sales locations, ranging from twelve to thirty. An employee of the publishers called the "wholesaler" is assigned to each district. The Examiner employed approximately forty such "wholesalers". (R. 64-65.)

The chief function of the wholesalers was to deliver the newspapers to the vendors at each edition time, survey their particular district to see if more papers were needed at a particular sales location, to collect from the news vendors for the papers sold, receive

the return of unsold papers and give credit therefor. (R. 65.)

Prior to August 31, 1937, the vendors were engaged by the publishers for the sale of their newspapers at particular corners or sales locations, without written agreement between them. (R. 65.)

After August 31, 1937, the publishers engaged news vendors to sell newspapers at particular sales locations under the terms of written contracts in force after that date between the news vendors' union and the publishers either by oral agreement or by written agreement such as the following (R. 65-66):

> The undersigned Publisher (Publishers) and News Vendor hereby agree that said News Vendor shall sell ..... at a (Full) (Part) Time Corner as designated by the Publisher (Publishers) in accordance with the terms of the contract between the San Francisco Newspaper Publisher's Association and the News Vendors' Union No. 20769, American Federation of Labor, dated .....
>
> .....
>
> Publisher.
>
> .....
>
> News Vendor.

The relationship between the news vendors and the publishers prior to August 31, 1937, was akin to that established by the succeeding written contracts in force after that date between the news vendors' union and the publishers, except as hereinafter indicated and for the exercise of a greater degree of control by the publishers over the activities of the vendors in

matters which were thereafter settled by the terms of the contracts. (R. 66.)

The first written contract between the publishers and the news vendors' union was executed on August 31, 1937, between the San Francisco Newspaper Publishers Association as the representative of the member publishers, including the taxpayers, and Newspaper and Periodical Vendors' and Distributors' Union No. 468, a labor union chartered by the American Federation of Labor, representing the news vendors. Successively, two other contracts were negotiated in 1939 and 1940 which were similar in terms to the first contract. Thereafter, two other contracts were negotiated in 1942 and 1944 and were likewise similar in terms to the first contract. (R. 66.)

The facts pertinent to the relationship between the publishers and the news vendors as fixed by the aforesaid written contracts and as appearing from their actual operation during the period here involved follow. (R. 66-67.)

In each of the union contracts there was contained a clause declaring it to be the intent of the parties to maintain the relationship of seller and buyer between the publishers and the news vendors and not an employer-employee relationship. The clause was inserted at the insistence of the publishers, the vendors agreeing because their primary concern was their economic betterment. (R. 67.)

Prior to 1939, persons wishing to sell newspapers would apply directly to the publishers for assignment

to any vacant sales location. After 1939, the union contracts required that the vendors be selected by the publishers from a list of available vendors furnished on request by the news vendors' union. (R. 67.)

A sales location was defined in the contract as full-time corners, part-time corners, special event corners, and special wrapped edition corners. There were also "bootjackers" or roving vendors, selling newspapers at large. Such locations were designated, limited, changed, discontinued or reestablished entirely at the publishers' direction and in order to coincide with the changing public demand. (R. 67.)

Prior to August 31, 1937, the services of the vendor were terminable at the will of the publisher. Thereafter, a vendor once engaged to sell at a particular location was entitled to man that location so long as it was maintained by the publisher, unless there should arise just cause for the discontinuance of further deliveries, such as drunkenness and failure to appear for work, or for his transfer from one location to another, in which event the publisher was entitled to effect such discontinuance or transfer. If the vendor felt that his contract to sell at a particular location was discontinued by the publisher without cause, he could then have the matter submitted to and determined by arbitration. (R. 67-68.)

The publishers fixed the so-called "retail price" at which the newspapers were to be sold to the public, as well as the so-called "wholesale" price which was the amount payable to the publishers for all newspapers delivered to the news vendors which were not

returned as unsold. Once fixed, such prices remained constant for the duration of the union contract then in force. The difference between the "wholesale" and "retail" price was the vendor's so-called "profit" or earnings. In addition, the news vendor was guaranteed under the terms of the contract a minimum weekly "profit". (R. 68.)

The news vendor makes no payment for the newspapers at the time they are delivered to him for sale. He accounts for all the newspapers delivered either at the end of each edition or near the end of each day's sales period. At that time, he "checks in" or pays to the wholesaler the so-called "wholesale" price for the newspapers delivered to him which he does not return, receives full credit for all unsold papers which are returned, keeps the difference between the amount paid and the amount received as his earnings. (R. 68.)

Within the limits prescribed by the union contracts, the publishers fixed for the various types of corners, the days and hours of sale which the publishers established to coincide with the news releases, the public's reading habits and its concentration at particular locations at particular periods. (R. 68-69.)

As each edition left the press, the newspapers were delivered to the vendors at their corners by the wholesalers. The quantity delivered did not rest in the vendor's discretion but depended upon what it was estimated the vendor, during the selling period, could dispose of at his location. Any disagreement as to the number of newspapers the vendor should take ap-

peared to be a matter for settlement between the publisher and the union. (R. 69.)

In their sale to the public, the vendors were required to sell complete newspapers only in such order as was designated by the publishers, and were not allowed to sell competitive newspapers without the publishers' consent. They were free to offer the papers for sale in the manner they saw fit, except that they were expected to be at their corners at the press release time, to stay there during the sales period, be able to sell papers and to take an interest in selling them. (R. 69.)

The manner in which the news vendors individually could offer the newspapers for sale to the public was so limited and of such nature as not to need control. (R. 69.)

Prior to August 31, 1937, the wholesaler gave orders to the vendors in matters connected with the performance of their duties and disciplined them for failure to comply. Thereafter, the wholesalers kept the news vendors under their surveillance to see that they performed properly, observed their conduct, made suggestions and reported misfeasances to the publishers. In cases of misconduct of vendors warranting dismissal, the wholesaler could "check in" vendors before the end of the day's selling period or report the misfeasance to the publisher, who could then discontinue further deliveries to the vendor involved or report his conduct to the union agents for any disciplining short of discontinuance of deliveries to him. (R. 69-70.)

The vendors have no expenses to bear and assume no risk except the risk of loss of papers delivered to them for sale and charged against them and all losses by reason of their credit selling of newspapers, if any. They provide their own transportation to and from sales locations. (R. 70.)

The vendors were not required to submit any form of report. There were no conferences or sales meetings which they were obliged to attend, nor was it necessary that they report to the publishers' premises for any purpose. (R. 70.)

All advertising placards and display stands or racks were provided by the publishers which bore the publishers' names. The vendors were forbidden to place anything else on the stands or racks except newspapers. (R. 70.)

The news vendors were engaged, as a means of livelihood, in regularly performing personal services constituting an integral part of the business operations of the publisher. (R. 70.)

The vendors were not prohibited from selling noncompetitive publications and articles of personal property and some so did. Nevertheless, as to the services performed by the news vendors for the publishers, the same were not incident to the pursuit of a separately established trade, business or profession of the news vendors, involving in their performance capital investment and the assumption of substantial financial risk, or the offering of similar services to the public at large. (R. 70-71.)

The services performed by the news vendor were subject to a reasonable measure of general control by the publishers over the manner and means of their performance. (R. 71.)

Upon notice and demand of the Collector of Internal Revenue, the publishers paid the taxes due under Titles VIII and IX of the Social Security Act, the Federal Insurance Contributions Act and the Federal Unemployment Tax Act measured by the earnings of the news vendors selling their newspapers after April 1, 1937, and through the year 1940. Thereafter, the publishers filed claims for refund and brought these suits for the recovery of the amounts so paid on the grounds that the news vendors were not their employees. (R. 64.)

The four suits were consolidated for trial, after which the Court below determined that the services performed by the news vendors were performed in the "employment" of the taxpayers within those statutes and directed the entry of judgment for the United States. (R. 19, 71.)

SUMMARY OF ARGUMENT.

The interpretation given by the authoritative and controlling cases to the term "employee" as used in the Social Security Act, and the results reached in those cases compel the conclusion that the taxpayers' street news vendors were employees and not independent contractors.

Most, if not all, of the factors material to the determination of whether the employment relationship exists, when applied to the established facts, tend to show the existence of that relationship between the taxpayers and the news vendors.

The news vendors are dependent as a matter of economic reality on the publishers' business to which they render service. Their occupational status is such as to bring them within the remedial purposes of the Act. The news vendors come within the scope of the term "employee" intended by the Act.

ARGUMENT.

I.

THE JUDICIAL AUTHORITIES COMPEL THE CONCLUSION THAT THE NEWS VENDORS ARE EMPLOYEES.

The taxes here involved are imposed with respect to the wages received or paid in "employment". The ultimate question presented is whether the services of the adult street news vendors engaged in the sale of the newspapers published by the taxpayers were performed in "employment" within the meaning of the statutes.

It is the taxpayers' contention that such news vendors were independent contractors and that the Court below erred in holding that the news vendors were their employees.

It is the Government's position that the Court below correctly ruled that the news vendors involved

were the taxpayers' employees within the statutes involved.

The findings of fact of the Court below are virtually unchallenged by the taxpayers. The only findings contested are those with respect to the extent of the control of the news vendors by the publishers and the finding that the street news vendors' services were an integral part of the taxpayers' business operations. Even those objections seem to be directed more to the significance and legal effect given by the Court below to the facts in such findings rather than to their accuracy.

In determining whether the findings support the conclusions of law and judgment entered, and in determining whether such findings and all the undisputed evidence establish that the news vendors are "employees" within the statutes involved, the construction and interpretation of that term, which is undefined in the statute, is controlled by *United States v. Silk,* 331 U. S. 704; *Bartels v. Birmingham,* 332 U. S. 126; *Rutherford Food Corp. v. McComb,* 331 U. S. 722; and *Labor Board v. Hearst Publications,*[2] 322 U. S. 111.

The *Silk* case determined that the primary consideration in the interpretation and application of the term employee was the effectuation of the well-known purposes and policies underlying the Social Security Act, that the term was not to be applied narrowly or

[2]All references hereafter to the "*Hearst Publications* case" are intended to refer to the case cited, and not to the two cases at bar brought by the same corporation.

legalistically so as to frustrate those purposes, and that the common law test of the employment relationship (p. 713) "often referred to as the power of control, whether exercised or not, over the manner of performing service" was not applicable. In the *Bartels* case, p. 130, it was made explicit that within the statutes involved "employees are those who as a matter of economic reality are dependent upon the business to which they render service."

In the *Silk* case, the Court said that in determining who were employees within those standards, the degrees of the control, opportunities for profit and loss, investment in facilities, permanency of relation and the skill required in the claimed independent operation were among the factors which should be considered. And in the *Rutherford Food Corp.* case, the Court made it clear that the extent to which the services in question were integrated into the business of the person for whom the services were performed was another material consideration in determining the nature of the relationship. Lastly, it was recognized that the factors stated and considered in those cases were non-inclusive; that no one was controlling, and that it is the total situation in any case that governs. *Silk* case, p. 719; *Bartels* case, p. 130.

These principles and rules have since been expressly recognized and applied in a number of cases involving the same general question, such as *Henry Broderick, Inc. v. Squire,* 163 F. 2d 980 (C.C.A. 9th), and more recently *Schwing v. United States,* 165 F. 2d 518 (C.C.A. 3d); *Fahs v. Tree-Gold Cooperative Growers*

of Florida, Inc. (C.C.A. 5th), decided February 3, 1948 (1 C.C.H. Unemployment Insurance Service, par. 9332); *Tapager v. Birmingham,* 75 F. Supp. 375 (N.D. Iowa) and *Atlantic Coast Life Ins. Co. v. United States* (E.D. S.C.), decided January 16, 1948 (1 C.C.H. Unemployment Insurance Service, par. 9329).

Obviously, the position taken by the taxpayers in the Court below, that the common law test of the employment was applicable, is no longer tenable. Now, the taxpayers' brief pays lip-service to the authority of the *Silk* decision, but endeavors to explain the *Silk* case in a manner so as to have this Court still determine the question presented on the common law concept of the employment relationship. It is said in the taxpayers' brief (p. 13) that the ordinary factors applied at common law still are the "important" ones, but that in applying these factors "technical concepts" should not be controlling.

The Supreme Court expressly recognized—and the Government has never contended otherwise—that control, which was the dominant or critical factor at common law, should still be considered. But the taxpayers' interpretation of the *Silk* case is unfounded. The factors enumerated in the *Silk* case were not urged by the taxpayers in the Court below and there is nothing in the *Silk* case from which it could be said that the Court was simply applying common law standards. The taxpayers have not noted that the "technical concepts" referred to in the *Silk* case were, as the Court explained (p. 713) "often referred to as power of control", the test which was rejected. See also *Bartels v. Birmingham,* 332 U. S. 126, 130.

The taxpayers' real position is disclosed from the argument predicated upon the fact that Congress amended the definition of the term employee in the Wagner Act to exclude "independent contractors" based upon a criticism of the Supreme Court decision in *Hearst Publications,* supra. From this, it is argued that to sustain the decision below would extend the Social Security Act beyond the intent of Congress, and "hence, be judicial legislation." (Br. 36.) The argument is tantamount to asking this Court to judicially legislate. It asks this Court to ignore, in effect, the *Silk* case, and judicially reach a conclusion in the application of the Social Security Act which could only be obtained by legislation in the application of the counterpart provision of the Wagner Act.

The Government maintains that the taxpayers' reationship with their news vendors might well be considered employment even within the limited scope of that term as determined by common law standards and tests.[3] And, applying the principles announced in the *Silk* and *Bartels* cases to the established facts and giving full effect to the decision in *Labor Board v. Hearst Publications,* supra, we submit that the Court below could not have correctly reached any other conclusion.

In the *Hearst Publications* case, the Labor Board had determined that street news vendors, selling newspapers under essentially the same circumstances as those involved herein, were employees within the

[3]See concurring opinion of Mr. Justice Reed in the *Hearst Publications* case, p. 135.

National Labor Relations Act. The Supreme Court upheld that determination because it had warrant in the record and a reasonable basis in law. (R. 32.) However, it is apparent from that Court's opinion that there was, as stated by the Court below, "wholehearted approval" of that determination. (R. 38.) The facts herein are even less favorable to the publishers' position than they were in the *Hearst Publications* case. The issues of fact so vigorously contested in the *Hearst Publications* case, such as the right of the publisher to control the hours of work, are here resolved by the contract between the union and the publishers. (Ex. 41, Sec. 27.)[4] In these cases the news vendors have no interest in the sales locations on which they sell those papers that would permit their purchase and sale, as was true in the *Hearst Publications* case. Moreover, the feature of the guaranteed earnings present in the contract between the union and the publishers here involved certainly was not present in the *Hearst Publications* case. The only fact present in the *Hearst Publications* case detrimental to publishers' position not present here, is that some of the news vendors there involved received small amounts from the publishers for redistributing the papers to other news vendors.

The established facts and the publishers' contentions in the *Hearst Publications* case are essentially the same as they are herein. We maintain that the reasoning and the result reached in *Labor Board v. Hearst Publications,* supra, are most persuasive, if

[4]This exhibit is printed in the appendix to the taxpayers' brief (pp. 8-35).

not controlling, authority sustaining the decision below.

Recent cases indicate the scope of the employment relationship contemplated by the Social Security Act under the controlling Supreme Court decisions. In *Schwing v. United States,* supra, there were involved journeymen tailors doing tailoring work for the taxpayers, retail clothing merchants, in making parts of suits at their own homes or shops. Each tailor did his work at his own home or shop free from supervision or control, furnished his own equipment, paid his own expenses, was paid on a piece-work basis, and had no guaranteed minimum weekly wage or guaranteed amount of work. The tailors were permitted to work for others and some did. In a cogent opinion realistically analyzing the facts, expressly looking to the "economic reality" of the situation, and considering all of the factors involved in the *Silk* case, the Circuit Court of Appeals reversed the District Court and concluded that the tailors were employees within the taxing provisions of the Social Security Act.

In *Fahs v. Tree-Gold Cooperative Growers of Florida, Inc.,* supra, the taxpayers were engaged in the business of producing and marketing citrus fruits. They contracted with certain individuals to assemble the fruit boxes, to secure the boxes when filled, to label and to load them, at a specified price per box. The persons so engaged, hired, discharged and paid the workmen to perform the necessary work. The equipment and materials were furnished by the taxpayers and the work was done on their premises. The tax-

payers exercised little or no direct detailed control over the work done by the persons engaged by the contractors, except to insist that the work keep pace with the requirements of the fruit being packed by the company. The Court concluded that all of the persons engaged in that work were the taxpayers' employees, saying that:

> From the facts disclosed in the record, we are of opinion that the services in question constituted a part of an integrated economic unit devoted to the packing of citrus fruit and fruit products. The work was simple, requiring no skill or experience, and was of relative permanence. None of the contractors had any investment in facilities, since the substantial tools and premises were furnished by the taxpayer. The degree of control exercised by the taxpayer was substantially the same as would be expected if the contractors had been admitted employees, paid by the piece. Piecework in itself makes pointless much of the control which normally would be exercised over employees paid by the hour. It is significant, however, that where the interests of the taxpayer were involved, the findings disclose that control was exercised. However the facts are weighed, they will not support a conclusion that the persons in question were not, as a matter of economic reality, dependent upon the taxpayer's business as their means of livelihood. Since the facts in the instant case and in the case of Rutherford v. McComb do not appear to be distinguishable in any material degree, we think a corresponding result should be reached.

In *Henry Broderick, Inc. v. Squire,* supra, this Court held that certain real estate brokers with whom

the taxpayer, also a real estate broker, contracted were independent contractors. But the contrast between the facts with respect to the brokers there involved and the news vendors makes it manifest that a contrasting conclusion is required. To illustrate: the brokers, unlike the news vendors, were licensed by the state to carry and were carrying on the same type of business as the taxpayer there involved, dividing the commissions on sales made by the brokers. The brokers agreed to retain their licenses and pay all fees arising out of their activities as a broker. The news vendors here involved have no such independent business or occupation. The taxpayer there involved agreed to furnish the brokers with desk, telephone and switchboard service; the publishers furnish no services to the news vendors. The brokers were not required to keep regular hours and were free to come and go and to give as little or much time to the taxpayer's business as they pleased; the news vendors were required to sell their papers throughout the entire sales period. (R. 53, 404.) The brokers did their work where they pleased and in the manner they pleased. The news vendors were controlled in the general conditions of their work, and the nature of the services was such as not to permit or require the exercise of any similar discretion. The brokers bore all their own expenses such as transportation and entertainment costs in seeing prospects, automobile insurance, repairs, oil, gasoline and license fees; the news vendors have no expenses. The brokers had an investment in their brokerage licenses; the news vendors have no investment. The brokers had oppor-

tunities for profit and loss which depend entirely upon their initiative and skill. The news vendors have no such opportunities for profit, a guarantee against loss, and little or no occasion to display initiative or skill.

Particularly pertinent are two recent decisions involving the status of outdoor salesmen under the Social Security Act. In *Atlantic Coast Life Ins. Co. v. United States,* supra, the question was whether the agents of the taxpayer engaged in selling life insurance, collecting the premiums and related activities for the taxpayer insurance company, were employees or independent contractors. The agents were allotted a particular territory, and their compensation in the form of commissions was deducted from the premiums collected by them, the balance being remitted by the agents to the taxpayer, together with a weekly report as to their collections, new business, lapsed and reinstated business. By the terms of the contract between the taxpayer and the agent, the agent was engaged in an independent profession. While the taxpayer's assistant managers had a certain amount of control and supervision over the agents, as a practical matter it was not exercised. The agent was free to fix his own working hours, and usually worked only three or four days a week. The agents were not required to report to the taxpayer's offices or to attend sales meetings. Those agents in rural areas using automobiles had to bear the attendant expenses. The District Court, following the *Silk* case, concluded that the agents were employees within the taxing provisions of the Social Security Act.

Similarly, in *Tapager v. Birmingham,* supra, the question involved was the status of the outdoor salesmen engaged by the taxpayer to sell household furnishings from door to door and make collections. The salesmen operated on a commission basis. Some of them deducted their commission from the purchase price or the collections made and remitted the balance to the taxpayer. The salesmen were free from detailed control, had no allotted territory, bore their own expense of operating an automobile if one was used, were required to report on their activities only once a week, and carried on their selling activities when they saw fit. The Court, likewise applying the *Silk* case, concluded that the salesmen were employees within the Social Security Act. See also *Your Ice Co. v. United States,* 57 F. Supp. 830 (M.D. Tenn.); *Stone v. United States,* 55 F. Supp. 230 (E.D. Pa.); *Johnson v. Altmeyer,* 63 F. Supp. 796 (W.D. Ky.).

A number of the state courts have considered the question of the status of news vendors under state laws. These decisions do not all reach the same conclusion, nor can they all be reconciled. Suffice it to say, there are a number of such decisions in accord with the *Hearst Publications* case, holding news vendors to be employees rather than independent contractors under circumstances similar to those herein, if not more favorable for the publishers' position. Among those cases, some of which were decided on the common law test, are: *Salt Lake Tribune Pub. Co. v. Industrial Comm.,* 99 Utah 259, 102 P. 2d 307; *Pacific Emp. Ins. Co. v. Indus. Acc. Com.,* 3 Cal. 2d 759, 47 P. 2d 270; *Matter of Scatola,* 282 N. Y. 689, 26 N. E.

2d 815; *Wilson v. Times Printing Co.,* 158 Wash. 95, 290 Pac. 691; *Hampton v. Macon News Printing Co.,* 64 Ga. App. 150, 12 S. E. 2d 425; *California Employment Com. v. Bates,* 24 Cal. 2d 432, 150 P. 2d 192; *Journal Pub. Co. v. State Unemployment Comp. Com'n,* 175 Ore. 627, 155 P. 2d 570; *In re Whitcher,* 263 App. Div. 906, 32 N. Y. S. 2d 32; *In re Wieder,* 266 App. Div. 933, 43 N. Y. S. 2d 873, affirmed with memorandum opinion, 292 N. Y. 609, 55 N. E. 2d 375; *Cal. Emp. Com. v. L. A. Down Town Shopping News Corp.,* 24 Cal. App. 2d 421, 150 P. 2d 186.

In *Salt Lake Tribune Pub. Co. v. Industrial Comm.,* supra, the contract between the publisher and the newspaper distributor and vendor was in terms a purchase and sale agreement with the express provision that the publisher (p. 260) "has no right of control, supervision or direction over said Circulator, or the means or method by which he may sell or distribute said newspapers and/or publications." In *Journal Pub. Co. v. State Unemployment Comp. Com'n,* supra, and *Hampton v. Macon News Printing Co.,* supra, the agreement between the newspaper publisher and the newspaper distributor or vendor was in terms a vendor-vendee agreement.

There are numerous other state court cases holding persons engaged in the sale of other commodities to be employees, where the vendor had as much or more latitude and discretion in the sale of the product in question than the news vendors involved herein. Such persons were usually outdoor or travelling salesmen, who, unlike news vendors, are not susceptible to con-

trol. Illustrative cases are set forth below.[5] In those marked with an asterisk, the vendor of the product in question was, by written agreement or otherwise, considered to be the purchaser of the product which he was selling for his employer.

The six Circuit Courts of Appeals cases relied on by the taxpayers are factually dissimilar, all were decided before the Silk decision, and four of them, at least, were decided on the common law test of the employment relationship.

---

[5] *Matter of Electrolux Corp.*, 288 N. Y. 440, 43 N. E. 2d 480 (vacuum cleaners); **Schomp v. Fuller Brush Co.*, 124 N.J.L. 487, 12 A. 2d 702, affirmed, 126 N.J.L. 368, 19 A. 2d 780 (brushes); **Creameries of America v. Ind. Comm.*, 98 Utah 571, 102 P. 2d 300 (dairy products); *In re Foy*, 10 Wash. 2d 317, 116 P. 2d 545 (cooking utensils); *Globe Grain & Milling Co. v. Ind. Comm.*, 98 Utah 36, 91 P. 2d 512, modified at rehearing, 98 Utah 48, 97 P. 2d 582 (sheep feed); **Sisk v. Arizona Ice & Cold Storage Co.*, 60 Ariz. 496, 141 P. 2d 395 (ice); *In re Castaldo*, 263 App. Div. 758, 30 N.Y.S. 2d 736; *Matter of Morton*, 284 N. Y. 167, 30 N.E. 2d 369 (undergarments); **Jack and Jill, Inc. v. Tone*, 126 Conn. 114, 9 A. 2d 497 (ice cream); *Singer Sew. Mach. Co. v. State U. C. C.*, 167 Ore. 142, 103 P. 2d 708, 116 P. 2d 744 (sewing machines); *Robert C. Buell & Co. v. Denaher*, 127 Conn. 606, 18 A. 2d 697 (securities); **Murphy v. Daumit*, 387 Ill. 406, 56 N.E. 2d 800 (vacuum cleaners); *Electrolux Corp. v. Board of Review*, 129 N.J.L. 154, 28 A. 2d 207; *Moorman Mfg. Co. v. Industrial Commission*, 241 Wis. 200, 5 N.W. 2d 743 (stock food); **Van Ogden, Inc. v. Murphy*, 390 Ill. 133, 60 N.E. 2d 877 (cosmetics and spices); *Leinbach Co. v. Unem. Comp. Board*, 146 Pa. Super. 237, 22 A. 2d 57 (clothing); *State v. Superior Court for Thurston County*, 22 Wash. 2d 811, 157 P. 2d 938 (oleomargarine).

II.

THE MATERIAL FACTORS APPLIED TO THE ESTABLISHED FACTS COMPEL THE CONCLUSION THAT THE NEWS VENDORS WERE EMPLOYEES.

We have stated above the non-inclusive list of factors, given in the *Silk* case, which should be considered in determining whether the employment relationship exists in any given case. Applying these factors and others to the established facts herein will, we believe, make it plain that most of these factors, if not all, tend to show that the news vendors were not independent contractors.

A. The control factor.

The Court below found as a fact that "The services performed by the news vendors were subject to a reasonable measure of general control by the publishers over the manner and means of their performance." (R. 71.) We shall endeavor to demonstrate that the correctness of this finding is well supported, if not established, by the findings and all the evidence. However, as pointed out above, this is only one of the factors to be considered, that it is the "total situation" that governs, and that the taxpayers are in error in asserting that this is the "most important" factor. (Br. 17.)

In the *Silk* case, the Court explicitly said that no one factor was controlling, and determined the coal unloaders involved to be employees although they were not subject to control. In the *Rutherford Food Corp.* case, hereinafter discussed, certain persons were determined to be the petitioners' employees, de-

spite the District Court's finding that the petitioners had never exercised any direction or control over them, which finding was not disturbed by either the Circuit Court of Appeals or the Supreme Court. In the *Bartels* case, the band leader was held to be the employer of members of the band, although it was provided by contract that the ballroom operator for whom the band was playing should (p. 128) "have complete control of the services which" the members of the band should render. And in *Matcovich v. Anglim,* 134 F. 2d 834, certiorari denied, 320 U. S. 744, this Court held that the taxidancers there involved were employees of the dance hall operator who engaged them despite the fact that there was no finding that the operator controlled the manner or method in which they danced.

Whatever discretion and latitude the vendors had in the performance of their service is of no legal significance. The Court below found that "The manner in which the news vendors individually could offer the newspapers for sales to the public was so limited and of such nature as not to need control." (R. 69.) The publishers' witnesses testified that there is only one manner in which newspapers can be sold and all that is required is "the ability to stand up and hand out papers in return for nickels." (R. 181, 407.) One news vendor testified that in his experience there had been no occasion for any orders or instructions. (R. 300.) The right to control and the exercise of control presupposes there is some choice or discretion in the method and means of performing the service involved and where it is absent the control factor can

have little or no significance. Newspaper vending is not a skilled occupation. Ten of the news vendors suffered from mental disability. (Ex. AJ.)

It is apparent that the publishers, like the publishers in the *Hearst Publications* case (p. 117-118) "in a variety of ways prescribe, if not the minutiae of daily activities, at least the broad terms and conditions of work." First, the news vendors were limited as to where they performed their service. They were engaged to sell newspapers at a particular sales location determined by the publishers. (R. 65.) Those locations were "designated, limited, changed, discontinued or reestablished entirely at the publishers' direction and in order to coincide with the changing public demand." (R. 67, Ex. 41, Sec. 13(d), Sec. 15.) The only apparent limitation on the publishers, unless the arbitration clause was applicable, was that "Any News Vendor assigned to a Full Time or Part Time Corner or Corners shall not be changed from one Corner to another for a period of at least one (1) week unless a change is made by mutual consent between the Union and the Publisher or Publishers concerned." (Ex. 41, Sec. 31(a), R. 67, 68.) Second, the union contract fixed the so-called retail price and the so-called wholesale price of the newspapers. (R. 68, Ex. 41, Secs. 8, 9). Thirdly, the publisher controls the amount of newspapers delivered to the news vendors for sale by him to the public. (R. 69.)[6]

---

[6]In *Labor Board v. Hearst Publications*, 322 U. S. 111, it was said (p. 117):

> Not only is the "profit" per paper thus effectively fixed by the publisher, but substantial control of the newsboys' total "take home" can be effected through the ability to designate

Fourthly, even the actual sale of the newspapers is controlled in part by the union contract in that the vendors were required to sell "complete newspapers only with all sections thereof in such order" as designated by the publishers and "were not allowed to sell competitive newspapers without the publishers' consent." (R. 69, Ex. 41, Secs. 14, 21.)

A fifth element of control may be found in the union contract provision under which as the Court found (R. 68-69) "the publishers fixed for the various types of corners, the days and hours of sale which the publishers established to coincide with the news releases, the public's reading habits and its concentration at particular locations at particular periods." (Ex. 41, Secs. 26, 27.) A sixth control may be found in the union contract provision that all unsold newspapers "shall be returned to the Publisher's representative in accordance with the requirements of the Publisher." (Ex. 41, Sec. 19.) This provision not only insured the news vendor against any risk attendant upon failure to sell newspapers, but also represents the positive requirement as to the disposition of the papers which the news vendor allegedly purchased and owned.

Lastly, it must be recognized realistically that in the publishers' right to terminate the relationship for

---

their sales areas and the power to determine the number of papers allocated to each. While as a practical matter this power is not exercised fully, the newsboys' "right" to decide how many papers they will take is also not absolute. In practice, the Board found, they cannot determine the size of their established order without the cooperation of the district manager. And often the number of papers they must take is determined unilaterally by the district managers.

cause or their right to designate sales locations and transfer a vendor from one location to another, there was implicit considerable power of control. *United States v. Wholesale Oil Co.,* 154 F. 2d 745, 748-749 (C.C.A.10th).

It is no answer for the taxpayers to point out cases holding that the employment relationship did not exist in which one of the elements of control described above was present. It is the "total situation" that governs and it is difficult, if not impossible, to find a case in which all of the elements of control described above are present other than the *Hearst Publications* case.

Considering these controls, and the nature of the news vendors' services, it is not apparent what "independence" the alleged "independent contractor" news vendor had, what discretion and latitude he had, or in what significant respects he may be said to be free from control.

The taxpayers insist that the news vendors were free from control, except only as to the "results" to be accomplished, but do not state what those results are. The news vendors cannot be forced into the classical description of an independent contractor as one who is responsible to the person with whom he contracts as to "results only" and not as to the "means and methods" by which such results are obtained. The news vendor is not engaged to obtain any particular result but to perform a continuing service for the publisher, that is, to be available on the street corner so that the public may purchase the

publisher's newspapers. Compare *Brown v. Industrial Acc. Comm.,* 174 Cal. 457, 461, 163 Pac. 664.

The publishers apparently believe that it is significant that the news vendors were not required to report to the publishers' premises, when there was no occasion to report; that no meetings of any news vendors were ever held when there was no apparent occasion for any meeting; and that no reports were required of any news vendors, when, in fact, the wholesaler kept the records of the news vendors' sales. (R. 201, 295, 298, 300, 314, 428-431, 433-435, Ex. 46, K, X, Y, Z, AA, AB.) The fact that the news vendors' earnings depended on the amount of their sales obviated any instructions to increase sales. Anyone operating on a piece work or commission basis is moved by self-interest to increase his production of sales as in the case of persons held to be employees in the *Silk, Tree-Gold, Schwing, Tapager* and *Atlantic Coast Life Ins.* cases, discussed hereinbefore.

It may be true in the actual day-to-day relationship that the news vendors were free from detailed direct control by the publishers. But the excerpts[7] from

---

[7]Exs. AD, AE:

December 15, 1943, "Drunk again on corner. I checked him in at 10:15 P.M. and sent him Home."; July 2, 1943, "Vendor was drunk and I checked him in on 1st Edition and sent him home. I covered corner with Boy."; April 16, 1943, "This vendor is doing a swell job on this corner * * * Please retain him."; April 7, 1943, "This vendor * * * was very unruly."; July 11, 1943, "This vendor is very poor one for this corner. He is away down from the regular sale * * *."; June 8, 1943, "Had to check above vendor in at 11:15 P.M. He refused to pay for his Holdouts. * * * He is very nasty and a poor Hustler."; June 2, 1943, "This vendor said he had to take his lunch hour from 1:00 to 2:00 AM or thereabouts on orders of his business agent. But we gave him his lunch hours as follows * * *."; May 2, 1943, "Vendor * * *

some of the "corner complaints" or the written reports of the wholesalers to the publishers on the misconduct of a vendor are illuminating as to who was "boss".

Even the common-law test of the employment relationship contemplated only "a reasonable measure of direction and control" which "need not relate to every detail" *(Jones v. Goodson,* 121 F. 2d 176, 180 (C.C.A. 10th)), but is to be determined by the nature of the work and the experience of the employee.[8]

---

too old for corner."; June 2, 1943, "Can't use for this corner. N.G. This vendor hollers Examiner and I'll be damned if I ever hear him holler S.F. Chronicle. He slips on our sale anywhere we put him."; June 2, 1943, "This vendor is a poor excuse as a vendor. He will not stay out until his designated hour. The corner above him * * * outsells him. * * * Kill the corner and send the vendor back to Daly City."; January 14, 1944, "* * * Drinks to much. I recommend he be moved off corner."; May 11, 1943, "Vendor did not go to work until 10:00 PM. Had to cover corner with a boy * * *; May 28, 1943, "When I drove up with the last edition 11:45 P.M. he only had 5 Chronicles and I wanted to give 10 more copies. He refused to accept so I checked him in and send vendor home. The trouble was that he wanted to leave corner before regular time."; May 24, 1943, "So I said why he was so late and he said *so what* and got abusive so I checked him."; November 25, 1943, "* * * Woody—Please fire this man."; May 2, 1943, "Above vendor was discharged from Golden Gate & Fillmore on April 27/43 (see complaint of same date). Since that time he hasn't been hired by this office, yet he shows up at O'Farrell and Powell; has an argument with the wholesalers and to climax the whole set up fails to check in * * * Who is doing the hiring?"; June 17, 1943, "He has often expressed that he would push the Examiners if he saw fit to do so, and there was nothing I could do about it. I want him removed."; August 10, 1943, "Would not take enough papers to last till time to quit at 2:00. Check him in at 12:00."

[8] *Walling v. American Needlecrafts,* 139 F. 2d 16 (C.C.A. 6th); *Western Express Co. v. Smeltzer,* 88 F. 2d 94 (C.C.A. 6th); *Peasley v. Murphy,* 381 Ill. 187, 44 N.E. 2d 876; *Andrews v. Commodore Knitting Mills,* 257 App. Div. 515, 13 N.Y.S. 2d 577. "The nature of the employee's work may be such that much or little supervision may be necessary." *Fisher v. The Industrial Commission,* 301 Ill. 621, 629, 134 N.E. 114, 117. See also *Western Express Co. v. Smeltzer, supra; Franklin Coal Co. v. The Industrial Commission,* 296 Ill. 329, 129 N.E. 811; *Eagle v. Industrial Comm.* 221 Wis. 166, 266 N. W. 274.

The control factor here exercised must be resolved in favor of the employment relationship under any theory.

B. Opportunities for profit and loss.

It is plain that the application of this factor discredits the taxpayers' contention. There were no opportunities for profit or loss based upon any capital investment because the news vendor had no capital investment. Certainly there was no real opportunity for loss in any sense (a) because the news vendors received full credit for all unsold papers, and (b) because the vendors were insured even against the loss of income in the provision in the union's contract which provided for a guarantee of a weekly minimum remuneration designated as "minimum weekly profit".

The possibility of loss was with respect to papers lost, stolen, or destroyed, a fact also present in the *Hearst Publications* case, which is not significant. "Employees are frequently charged with the value of the employer's property entrusted to the employees' care, and later docked for an equal amount for negligent loss or misuse." See the dissenting opinion in *Hearst Publications v. National L. Relations Board,* 136 F. 2d 608, 615 (C.C.A. 9th). The record does not show the extent to which the news vendors give credit. But any such voluntary assumed risk in what is customarily a cash transaction could hardly be considered an opportunity for loss. It has been the practice in many restaurants and bars to require the waiters, who are indisputably employees, to pay for the food and drinks and to bear the loss for any failure to collect from the patron.

Whatever limited opportunities the news vendor had to increase his earnings does not differ from the increased earnings received by an employee working on a commission or piece-work basis for the increased sales or production, as illustrated in the federal cases cited above.

C. The investment factor.

The context of the *Silk* opinion indicates that the "investment in facilities" factor was significant in the conclusion reached with respect to the truckers and the unloaders involved in the *Silk* case.

The application of that factor in the cases at bar is free from doubt. The news vendor has no investment in facilities whatsoever. (R. 70-71.) The publishers have a very large investment and much of that investment, such as the high speed press, is designed to facilitate immediate distribution of the news and newspapers through the street news vendors, where saleability could be more easily accomplished by the recency of the news. Even the relatively minute investment in the display stands for the newspapers used by the news vendors was made by the publishers. (R. 70.)

D. Permanency of relationship.

There was a permanency of relationship. The publishers' contract with the news vendor was a continuing one for an indefinite period and, unlike the relationship between independent contractors, did not expire at the end of any particular job or result. Moreover, an estimate of the average duration of the relationship may be gained from the fact that on March

16, 1945, the news vendors' union organized in 1937 had approximately 377 members, 222 of whom were charter members. (Ex. AJ, R. 236.)

E. Skill required.

Certainly the publishers would not contend that any particular skill was involved in the street sale of newspapers and certainly no managerial skill involving any business judgment or decisions was required. The opinion of the Court below, the findings, and the undisputed evidence pointed out in the discussion on the control factor leave no doubt that the taxpayers cannot rely on this factor. (R. 69, 71, 181, 300, 407.)

F. The integration factor.

The taxpayers complain (Br. 7) that the Court below erred "In finding that the retail sale of newspapers was an integral part of the publisher's business, and in failing to find that the retail sale of newspapers by persons independent of the publisher was common practice and not unrealistic." The actual finding to which the taxpayers apparently object and which is quite different is this (R. 70):

> The news vendors were engaged, as a means of livelihood, in regularly performing personal services constituting an integral part of the business operations of the publishers.

This finding does not control the correctness of the conclusion reached. But, we submit, that finding is manifestly sound, and is supported by more than substantial evidence. It is a material consideration demonstrating the employment nature of the relationship with the news vendors. The significance of the

integration factor is found in the *Rutherford Food Corp.* case involving the question of whether certain meat boners were employees of the petitioners within the Fair Labor Standards Act.[9] The petitioners there involved operating slaughter houses, were engaged in the business of processing meat for the production of boned beef. During the period in question one of the petitioners entered into a written contract with an experienced boner, which provided that he would assemble a group of skilled boners to do the boning at the slaughter house, for which he should be paid a specified amount per hundred weight of boned beef; that he would engage, pay and have complete control over the other boners who would be his employees; and petitioners would be furnished a room in its plant for the work. The contract was subsequently modified in only one essential respect by providing for the payment of a certain amount of the rent for the use of the boning room, although no rent was ever paid. The money paid by the petitioners for the boning was shared equally by all the boners except for a brief time when some of the boners were paid by the hour by the person contracting with the petitioners. The boners furnished their own tools, consisting of a hook, a knife, a knife sharpener, and a leather apron. In reaching the conclusion that these boners were employees of the petitioners, the Court manifestly gave

[9]In considering that question, the Court recognized that (p. 727) "Decisions that define the coverage of the employer-employee relationship under the Labor and Social Security Acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act." The converse application of the Fair Labor Standards Act decisions to the question of the employment relationship under the Social Security Act is found in the *Tree-Gold* case, *supra.*

particular weight to the fact that the boning was one of a series of steps in the petitioners' operation, occurring between the time the slaughtered cattle were dressed and the time the boned meat was trimmed for waste by an employee of the petitioners. The Court also noted that petitioners never attempted to control the hours of the boners except that they were required to keep the work current and the hours they worked depended in a large measure upon the number of cattle slaughtered. The Supreme Court approved the characterization of the Circuit Court of Appeals in that case that the boners were part of the integrated unit of producing boned beef. It is to be particularly noted that the boners were not engaged by the petitioners, their compensation was not received directly from the petitioners, nor was it controlled by them, since each boner shared equally with every other boner.

The reasoning of the *Rutherford Food Corp.* case was applied in the *Tree-Gold* case under parallel facts reaching the same conclusion. See also *Tapager v. Birmingham,* supra.

Applying the integration factor to the situation before the Court, it is evident that the services of the street news vendors are an integral part of the taxpayers' business and not an independent calling. The taxpayers are engaged in a large independent business enterprise whose end product is the distribution of news to the public. It encompasses a large capital investment. It depends for its existence upon the sale of the newspapers to the public, not only because of the amount received for the papers sold, but, more

importantly, because paid circulation vitally affects its revenues from advertising. (R. 162-163, 393.) The sale of a newspaper to a wholesale distributor would have little business significance to the taxpayers, and so-called sales to a news vendor would be meaningless from any viewpoint considering the vendor's privilege of returning all unsold newspapers. As a publisher's witness testified: Circulation "is the life blood of a newspaper." (R. 162.) See *Journal Pub. Co. v. State Unemployment Comp. Com'n,* supra.

The publisher obtains the distribution of newspapers to the public in several ways, such as mail subscription, dealers and carriers, counter sales and street vendors. (Exs. P-W.) The Court below made no determination of the relationship between the publishers and those distributing newspapers to the public through any channel except street vendors. The integration factor is peculiarly applicable to sales through street vendors for at least two reasons. First, the sales through street vendors comprise a very substantial portion of all the sales. In the case of the Examiner, the sales through street vendors averaged thirty-seven per cent of city circulation and seventeen per cent of the total circulation during the period in question. (Exs. P-S.) Secondly, the distribution through street sales must necessarily be closely integrated into the publishers' operation because of the very nature of street sales which is so well described in the taxpayers' closing trial brief (p. 6):

> It is pertinent to see what some of the peculiarities of the newspaper business are. Newspapers are extremely perishable, are sold, so far as this discussion is concerned, only on the pub-

> lic streets and for a very low price. Time is of the essence to the business. The publisher has no control over when news is going to break. When it does, he must get it into the hands of the public in the shortest possible time—otherwise it ceases to be news. For this reason, there are usually a number of issues a day, both of the morning and evening papers. Each issue as it comes out supersedes its predecessor, and the predecessor thereupon becomes obsolete and of little, if any, value. All of this means that the retailing of newspapers must be conducted as [sic] specified times and places so that distribution may be rapid and the papers made available to the public as soon as possible after they come off of the press. It follows that the contracts, and all the provisions thereof, have been drawn to accomplish this objective.

To accomplish this "objective" it was necessary for the taxpayers to obtain the services of news vendors to sell the newspapers to the public while the news was still saleable. The terms of the union contracts and their daily operating practice represent the resultant integration of the services of the news vendors into the publishers' business. The street sales of newspapers through the news vendors is just as closely integrated into the taxpayers' business as are the street sales accomplished through their unattended street news racks which are also supplied with newspapers by the wholesalers who are indisputably the taxpayers' employees. (R. 395-399, 432.)

Conversely, it cannot be said that the news vendor has an independent calling or business of his own which he integrates with the publishers' business.

There is nothing in the inherent nature of selling newspapers on the corner which would indicate it to be an independent business or calling. The news vendor does not hold himself out to the public as doing business in his own name or being engaged in business for himself. The news vendors who have no investment, expenses, advertising, payroll, permanency of work location, books or records, and who are set up in their so-called business by the publisher by the simple expedient of putting newspapers in their hands, and who can be put out of business with almost the same ease, can hardly be put in the ordinary concept of the retail merchant, even in the most specialized and humble business. (R. 314-315.) The only name associated with the sale of newspapers is the name of the newspaper being sold, which appears on the newspapers and the publishers' rack which holds the papers.

The fact, as well as the appearance, is that the news vendors are engaged, not in their own business, but in the business of the publishers. The news vendors are not in a position of an independent merchant who purchases goods from whom he pleases, under such terms and conditions he chooses and disposes of his services or products at such time and place as he chooses. When the news vendors here lose their connection with the publishers, they cut off their entire income.

There is no better indication of the extent of the integration, and of whose business the news vendors are engaged in than the fact that the publishers find it necessary to engage news vendors to sell at corners or sales locations where they know in advance it will

be necessary to pay the vendor something to permit him to earn the minimum guaranteed by the contract. (R. 134-135, 159-160, 163, 349-350.)

The fact that the news vendor might undertake to obtain substitutes or relief men during meals and for other reasons does not make them any the more independent contractors, and the extent of the practice has not been shown. That fact did not affect the status of the news vendors doing the same thing in *Labor Board v. Hearst Publications,* 322 U. S. 111, 119, fn. 17. In the *Rutherford Food Corp., Tree-Gold,* and *Wholesale Oil Co.* cases, supra, the persons determined to be employees engaged others to assist in the work.

The fact that a maximum of thirty-five vendors had large magazine stands cannot affect this Court's decision on the status of 650 to 750 vendors, most of whom sold newspapers exclusively. (R. 29, 227-230.) The relationship of the vendors selling articles other than newspapers was not different from those selling newspapers exclusively. (R. 47.) The relationship between the vendors and the persons from whom or for whom they were selling such other articles has not been shown, and was not part of an independently established business. (R. 70-71.) In any event, that relationship does not affect the news vendors' relationship with the publishers. Compare *Western Union Tel. Co. v. McComb,* 165 F. 2d 65, 71 (C.C.A. 6th). The news vendors in the *Hearst Publications* case, supra, p. 119, fn. 17, sold newspapers, periodicals and other items not furnished them by the publishers. See also *Sisk v. Arizona Ice & Cold Storage Co.,* supra.

G. The right to terminate the relationship.

One of the most universally accepted indicia of the employment relationship is the right of one of the parties to terminate the relationship at any time or on short notice. *Los Angeles Athletic Club v. United States,* 54 F. Supp. 702 (S.D. Cal.), appeal dismissed, 144 F. 2d 352 (C.C.A. 9th). That right is present in the union contract provision that "Each publisher may discontinue sales to any News Vendor." (Ex. 41, Sec. 15.) Any right which the vendor may have had to contest the discharge for lack of cause by submitting it to arbitration does not derogate from the fact that this right to terminate existed. The protection against arbitrary discharge is not uncommon in union contracts.

H. The guaranteed earnings.

One of the most illuminating provisions of the union contract on the nature of the relationship created is the guarantee of a weekly minimum remuneration designated as "minimum weekly profit". This fact puts the news vendors in the category of employees performing personal services on a piece-work or commission basis with a minimum wage guarantee. In subsequent contracts there was even a provision for the payment of a bonus. (Ex. 43, Sec. 16(a).)

I. The parties to the contract.

Considering the nature of the contract governing the relationship between the taxpayers and the news vendors, and the character of the motive of the parties in entering into it, the only reasonable construction

of the relationship is that of employer and employee. The taxpayers are publishers who are engaged in an independent business enterprise of the production and distribution of newspapers to the public. The news vendors' union is a labor union, in other words, an organization composed of persons who perform "labor" for others. On three occasions during the taxable period, the union membership voted to go on strike against the publishers. (R. 266-267.) The union is not in a retail business men's association or any organization of independent business men such as the San Francisco Newspaper Publishers Association. Its affiliations are solely with other labor unions and labor organizations, and not with any business men's organizations. (R. 236-239, 249, Exs. B, C, D.) The union contract here involved is a normal collective bargaining agreement between an employer and the union acting as the sole bargaining agent for a group of employees. The Supreme Court in *Labor Board v. Hearst Publications,* supra, indicated that the very economic conditions giving rise to such labor unions and collective bargaining agreements show that the union members are to be treated as employees in the application of legislation affecting their economic rights and conditions. To hold that this labor union represents a number of independent contractors and business men strains credulity. Of course, there is no similarity between the work of the news vendors and the work of artists, engineers and architects organized in "unions".

J. The news vendor was not a purchaser of the newspaper.

Even if the taxpayers were correct in their assumption that the news vendors were the purchasers and owners of the newspapers acquired from taxpayers, that would not affect the result. We have cited above a number of cases in which persons have been held to be employees of the person whose product they were selling, even though the vendor was, by written agreement or otherwise, considered to be the purchaser of the product which he was selling, as in *Salt Lake Tribune Pub. Co. v. Industrial Comm.,* supra; *Journal Pub. Co. v. State Unemployment Comp. Com'n,* supra; *Hampton v. Macon News Printing Co.,* supra, and others. The news vendors in the *Hearst Publications* case acquired their newspapers under the same conditions as the vendors here involved, and the Court apparently assumed that the vendor was the purchaser.

However, there is considerable doubt whether it can be said that the news vendors here involved were the purchasers and owners of the taxpayers' newspapers. No such determination was made by the Court below and the undisputed facts indicate a diametrically opposed conclusion. The written contract between the individual news vendor and publisher does not provide for the purchase of the newspapers by the vendor, but that the vendor agreed to "sell" the publisher's newspaper at a location designated by the publisher. The union contract expressly provides that it governs "the sale of newspapers of the Publishers by News Vendors." (Ex. 41, Sec. 2.) The complaints

admit that the news vendors are responsible to the publishers for the results accomplished in the "retail sale" of the newspapers to the public. (R. 8.) Thus, it is evident that the controlling contracts between the publishers and the news vendors were not for the sale by the publishers to and the purchase by the news vendors but a contract governing the services performed by the news vendor in selling the newspapers to the public. It was the obvious purpose to provide for the effective and ultimate sale of the publishers' newspapers by the news vendors to the public, which is the publishers' business.

The news vendor is not in any sense an independent buyer of the newspapers, free to do with them as he sees fit. The terms and conditions under which he possesses the newspapers are inconsistent with the conclusion that he is the purchaser or the owner of the newspapers. The union contract governs where, when, the condition and the price at which he sells the newspapers. He pays nothing for the papers when received, and is responsible only for the so-called "wholesale" price at the end of the day's sales period when he is required to account for all papers sold, or which have been destroyed or lost. The union contract even provides that "All unsold complete newspapers shall be returned to the Publisher's representative in accordance with the requirements of the Publisher." (Ex. 41, Sec. 19.) Thus, the news vendor is not even free to retain the newspapers he allegedly purchased even at the expense of paying the "wholesale" price.

The statement in the union contract that it was the intention of the parties to maintain the relationship of buyer and seller was inserted in the contract not because of any mutual belief to that effect but because of the insistence of the publishers, the vendors agreeing because their primary concern was their economic betterment and not the name that the publishers wished to give to the relationship. (R. 67, 151, 242-243, Exs. A, J, 44.)

The wishes of the parties and the name given to the relationship by the contract cannot control the liability for taxes. *Bartels v. Birmingham, supra; Rutherford Food Corp. v. McComb, supra; Matcovich v. Anglim, supra.* This Court has said that "legal relationships are determined not by labels but by contractual provisions, interpreted according to law." *Childers v. Commissioner,* 80 F. 2d 27, 31. See also *Watson v. Commissioner,* 62 F. 2d 35, 36 (C.C.A. 9th). In a number of the salesmen cases, cited above, it was held that the relationship was that of employer and employee when the written agreement between the parties designated the employee to be a lessee, licensee, buyer, partner or independent contractor. The contract between the news vendors and the publishers must be adjudicated by what was done, and not by what might have been intended to be done. *Davidson v. Commissioner,* 305 U. S. 44, 46. Their intention might be binding as between them "but not as against the Treasury." *Glenmore Securities Corp. v. Commissioner,* 62 F. 2d 780, 781 (C.C.A. 2d), certiorari denied, 289 U. S. 754.

III.

THE NEWS VENDORS ARE EMPLOYEES AS A MATTER OF "ECONOMIC REALITY".

The characterization of employees under the Social Security Act in the *Bartels* case as (p. 130) "those who as a matter of economic reality are dependent upon the business to which they render service" covers the news vendors. They devote their full services to the publishers, selling newspapers exclusively in most instances. They have no investment, no business identity or good will; they acquire no capital and are dependent upon the publishers' business for their livelihood. When their relationship with the publishers is terminated, they lose their source of income, in short, they "are out of a job" like any employee.

For the same reasons, it is apparent that the news vendors here involved come within the remedial purpose of the statute. Any doubt about their status should be resolved by the determination which affords them the benefits of the Social Security Act, as well as subjecting their wages to the taxes imposed by the Act. In essence, the news vendors constitute an occupational group, performing unskilled services, and entering into collective bargaining with persons for whom they perform their services to obtain economic benefits. They constitute a class of workers especially vulnerable to the hazards of unemployment, as evidenced by their advanced average age, their disabilities, and the fact that their earnings are in the lowest bracket. The weekly guarantee in the

third union contract in 1940 for forty-six hours of service was $19 per week. (Ex. 41, Sec. 16.) The insecurity of the news vendors and the need to classify them as employees is implicit within some of the very reasons given by the union why they should be exempted from the taxes. (Ex. AJ, Amicus Br. 5.) The union urges as a reason for exemption that the publishers would no longer be willing to engage them to sell the newspapers if they were held to be employees, because the publishers would be reluctant to assume the responsibility of employers for such items as workmen's compensation insurance which, in the case of news vendors having disabilities, might be high.

To exempt the news vendors here involved from the taxes and benefits under the Social Security Act would be to defeat its purpose and application to an occupational group clearly intended to be included within the scope of the Act.

CONCLUSION.

We respectfully submit that the decision of the court below is correct and should be affirmed.

Dated, April 12, 1948.

THERON LAMAR CAUDLE,
Assistant Attorney General,
SEWALL KEY,
A. F. PRESCOTT,
ARTHUR L. JACOBS,
Special Assistants to the Attorney General.

FRANK J. HENNESSY,
United States Attorney,
WILLIAM E. LICKING,
Assistant United States Attorney.

(Appendix Follows.)

Appendix.

Appendix

Social Security Act, c. 531, 49 Stat. 620:

Section 801. * * * there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

* * * * * * *

(42 U.S.C. 1940 ed., Sec. 1001.)

Sec. 804. * * * every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

* * * * * * *

(42 U.S.C. 1940 ed., Sec. 1004.)

Sec. 811. When used in this title—

* * * * * * *

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, * * *

* * * * * * *

(42 U.S.C. 1940 ed., Sec. 1011.)

Section 901. * * * every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) pay-

able by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:

* * * * * * *

(42 U.S.C. 1940 ed., Sec. 1101.)

Sec. 907. When used in this title—

* * * * * * *

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, * * *

* * * * * * *

(42 U.S.C. 1940 ed., Sec. 1107.)

Substantially the same language quoted in the above sections may be found in Sections 1400, 1410, 1426(b), 1600 and 1607(c) of the Internal Revenue Code (26 U.S.C. 1940 ed., Secs. 1400, 1410, 1426, 1600 and 1607).

Treasury Regulations 90, promulgated under Title IX of the Social Security Act:

ART. 205. *Employed individuals.*— * * *

The words "employ," "employer," and "employee," as used in this article, are to be taken in their ordinary meaning. * * *

Whether the relationship of employer and employee exists, will in doubtful cases be determined upon an examination of the particular facts of each case.

Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the de-

tails and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

The mesurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent

> trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.
>
> * * * * * * *

Substantially the same language quoted above may be found in Article 3 of Treasury Regulations 91, promulgated under Title VIII of the Social Security Act; section 402.204 of Treasury Regulations 106, promulgated under the Federal Insurance Contributions Act; and Section 403.204 of Treasury Regulations 107, promulgated under the Federal Unemployment Tax Act.